SUPREME COURT, U.S.
APR 9 1981

Nos. 79-1429 and 79-1583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., *et al.*,

Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

NATIONAL COTTON COUNCIL OF AMERICA,

Petitioner,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE RESPONSE AND RESPONSE OF PETITIONERS TO THE SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

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April 9, 1981

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Pursuant to Rules 35.5 and 35.6 of the Rules of this Court, petitioners, by their counsel, hereby move for leave to file the attached Response to the Supplemental

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Memorandum for the Federal Respondent that was submitted to this Court on March 27, 1981.

The Supplemental Memorandum for the Federal Respondent states the Secretary of Labor's intention to institute a supplemental rulemaking proceeding in which the Cotton Dust Standard at issue in the pending cases will be reevaluated and reconsidered. As part of that reassessment, the Secretary plans to examine the role that cost-benefit analysis should play in the development of standards under Section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b). The Supplemental Memorandum for the Federal Respondent discusses the Secretary's view of how this new development affects the pending cases. Petitioners hereby seek to present to the Court their view on this question as well.

Accordingly, petitioners respectfully request that their Motion for Leave to File the attached Response to the Supplemental Memorandum for the Federal Respondent be granted.

Respectfully submitted,

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RESPONSE OF PETITIONERS TO THE SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

These consolidated cases challenge the validity of the Standard for Occupational Exposure to Cotton Dust promulgated by the Secretary of Labor on June 19, 1978. 29 C.F.R. § 1910.1043, 43 Fed. Reg. 27350 (1978).[1] The

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[1] Amended at 43 Fed. Reg. 28473, 35032, and 56893 (1978).

cases were briefed in November and December 1980 and argued on January 21, 1981. Among the questions presented are (1) whether the Occupational Safety and Health Administration ("OSHA") applied any meaningful or effective cost-related limitations in adopting the Cotton Dust Standard, and (2) whether OSHA is required to show a reasonable relationship between the risk reduction benefits and the costs of the Standard.

On March 27, 1981, the Secretary of Labor made public an Advance Notice of Proposed Rulemaking.[2] That document states the Secretary's intention to undertake a rulemaking proceeding to reevaluate and reconsider the Cotton Dust Standard, with particular emphasis being given to the economic consequences of the Standard and the feasibility and utility of engaging in cost-benefit analysis in setting this and other standards limiting exposure to toxic substances.

As part of this undertaking, OSHA plans "to reexamine its previous position" that use of cost-benefit analysis in the setting of standards for toxic substances would be inconsistent with the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976 & Supp. III 1979). Supplemental Memorandum for the Federal Respondent at 3a. OSHA also "intends to invite the submission of information" relating to the overall economic impact of the Standard on the affected industry and to a cost-benefit assessment of the Standard. *Id.* at 4a-5a. "[O]ther matters relevant to the enforcement of the standard" also may be considered in the proposed rulemaking. *Id.* at 5a-6a. While this reconsideration and reevaluation is underway, the Standard is

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[2] The notice was published in the Federal Register of March 31, 1981, 46 Fed. Reg. 19501, and appears as an Appendix to the Supplemental Memorandum for the Federal Respondent filed with this Court on March 27, 1981.

to "remain in effect and continue to be enforced." *Id.* at 6a.

In light of these developments, the Secretary of Labor suggests that the Court should not decide these cases at the present time. Petitioners are in complete agreement with this suggestion. As noted above, two of the principal issues raised in these cases concern the adequacy of OSHA's economic feasibility analysis and its failure to assess the expected benefits of the Standard in light of its costs. These two issues now have been identified as the most significant points that the agency plans to reevaluate and reconsider in the rulemaking proceeding that it proposes to institute. Consequently, although these cases are not now moot, the fact that the agency plans to reconsider its position on two of the central issues pending before this Court (and perhaps on a variety of other issues as well) indicates that the cases may become moot, making it unnecessary for this Court to decide them. For that reason, petitioners concur in the Secretary's suggestion that the cases not be decided now.

The Secretary goes on to suggest that the Court should "vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development." *Id.* at 4. In petitioners' view, such a course of action would be appropriate if the Secretary had withdrawn the Cotton Dust Standard or explicitly conceded its invalidity. *See EPA v. Brown*, 431 U.S. 99 (1977). The Secretary, however, has not withdrawn the Standard. To the contrary, OSHA has stated its intention to leave the Standard in effect while the proposed rulemaking proceeds.[3]

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[3] Because the Standard remains in effect (and because there is no suggestion that the court of appeals should reconsider its decision in light of an intervening Supreme Court decision), *Cotton Warehouse Ass'n v. Marshall*, 49 U.S.L.W. 3244 (U.S. 1980), is not in point.

In these circumstances, petitioners believe it would be more appropriate for this Court simply to hold these cases in abeyance and to remand the record to the court of appeals with an instruction that the record be remanded to the agency for further proceedings. When those proceedings are concluded, this Court will be in a better position to determine what disposition should be made of the pending cases. It may well be that the final action taken by OSHA in those further proceedings will make it appropriate to vacate the court of appeals' judgment or to dismiss these cases on some other ground. On the other hand, it is conceivable that those proceedings will not result in action that would obviate the need for this Court to decide the cases.

Accordingly, petitioners respectfully suggest that this Court retain jurisdiction over the present cases, hold them in abeyance, and remand the record to the court of appeals with an instruction that the record be remanded to the agency for further proceedings.

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